IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

MONDAY, THE 4TH DECEMBER 2006 / 13TH AGRAHAYANA 1928

ITA.No. 201 of 2000()

AGAINST THE ORDER DATED 30/06/2000 IN
ITA.360/1996 of I.T.A.TRIBUNAL,COCHIN BENCH
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APPELLANT/RESPONDENT/

THE COMMISSIONER OF INCOME TAX,
TRIVANDRUM.

BY ADV. SRI.P.K.R.MENON(SR.),SR.COUNSEL FOR IT

RESPONDENT:APPELLANT/APPELLANT/ASSESSEE

SMT.ROSAMMA PHILIPOSE,
C/O.A.J.PHILIPOSE & CO.
AZHAKANAKUZHIYIL, AYOOR SOUTH 689 611

BY ADV. SRI.JOHN RAMESH K.I.JOHN

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 04/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R.RAMAN & K.P.BALACHANDRAN,JJ.

I.T.APPEAL.NO.201 OF 2000

Dated this the day of November, 2006

JUDGMENT

Raman,J.

This is an appeal filed by the Commissioner of Income Tax, Thiruvananthapuram challenging the order passed by the Tribunal, Cochin Bench in I.T.A.No.360/Coch/96. The brief facts are as follows:

2. There was a seizure and search of the premises of the assessee and the firm in which the assessee is a partner. Notice under Section 142 was issued to the assessee on 4/8/1992. Pursuant to the notice, the assessee filed a return showing the income of Rs.35,000/-. One of the partners of the firm is her husband Sri A.J. Philipose. From the seized documents it was found that the

assessee has taken certain fixed deposits receipts and purchased immovables. These investments however could not be satisfactorily explained, according to the Income Tax Officer. After discussing various issues, the Assessing Officer considered that an amount of Rs.2,31,000/- as unexplained investment in the hands of the assessee and made a protective assessment with the following observations:

> "Obviously, the source for Rs.2,31,000/- still remains to be explained out of Rs.3,65,250/- invested during the year. This will be assessed in the hands of the assessee protectively u/s. 69 **with a finding** that the various investments made by the assessee have to be considered in the hands of her husband in the respective years and the deficiency as worked out above, will also be assessed in his hands on substantive basis during the year under consideration." (Emphasis given).

3. The assessee appealed to the Commissioner of Income Tax. It was the

contention of the assessee that the protective assessment is not sustainable in law and that only when the assessing authority has any doubt as to the person who is or will be deemed to be in receipt of the income, such procedure is contemplated. No protective or precautionary assessment can be visualised in respect of one of and the same income on two different persons. Reliance was also placed on the decision of the Apex Court in (43 ITR 387). It is also contended that the practice of making protective assessment has been judicially recognised in certain circumstances where it appears to the Assessing Authority that certain income has been generated during the relevant period, but it is not clear to show that who has received that income with prima facie evidence appearing to show that the income might have been received by one or the other or by both together. In such circumstances it will

be open to the assessing authority concerned to take appropriate proceedings against both the individuals. Here, the assessment of the assessee's husband has of not been done and hence there is no question of any protective assessment. In such circumstances, no parallel proceedings can be completed in this case. It was pointed out that some of the wealth tax statement and the letters filed by the appellant were also placed reliance on to contend that letters and the wealth statement evidenced deposits from 1974-75 onwards with the State Bank of Travancore and the Indian Overseas Bank and if these deposits have been accepted as correct as shown in the wealth statement, there is no basis for for rejecting the explanation. The first Appellate Authority after referring to the contentions raised by the parties, found that the matter is to be restored to the Assessing Authority for fresh

consideration, after taking into account the wealth tax explanation offered by the assessee. Dissatisfied with the order passed by the Appellate Authority the assessee preferred a further appeal to the Tribunal. Before the Tribunal it was contended by the assessee by the assessee that in the instant case the assessment of the husband was completed falling the benefit under the Kar Vivad Samadhan Scheme. Since the substantive assessment has become final and the tax paid. There was no reason to proceed against the assessee when the assessment on the assessee was on protective basis. The representative of the department on the other contended that only the assess can raise this contention before the appropriate Authority at the time when the consequential order is appealed against. As a matter of fact, at the time when the Tribunal passed the order, the consequential order has already been passed

and on that basis it was also contended by the department that the appeal before the Tribunal has become infructuous. After considering the rival submissions of the parties, the Tribunal held that there cannot be assessment of the income in two things; either it should be in the hands of the person whose assessment was made on substantive basis or in the hands of the assessee, whose assessment was made on protective basis. In the instant case, the Tribunal noted that "in the instant case it is not disputed that the substantive additions were made in the hands of the assessee's husband and the matter has not has now been settled under the Kar Vivad Samadhan Scheme." The stand of the department that the Commissioner (Appeals) had only set aside the assessment in the case of the assessee and the consequential order has been passed and as such the assessee is at liberty to agitate the

matter at appropriate time before the Appropriate Authority. This right cannot be accepted. The question that is challenged in appeal being an additions made in the hands of the assessee on protective basis. The assessment made in the hands of the assessee's husband on substantive basis has become final and the tax demanded paid under the Kar Vivad Samadhan Scheme. As such further proceedings in the case of the assessee where the assessment is made on protective basis goes against the spirit of the scheme envisaged. It was in that view that the Tribunal allowed the appeal by the assessee, against which the present appeal is preferred by the Department. The learned counsel Sri George K. George appearing on behalf of the appellant contended as follows; (i) that since the consequential orders have been passed by the Income Tax Officer pursuant to the remand order by the first Appellate

Authority, the appeal itself became infructuous and hence the Tribunal ought not to have set aside the order of the Income Tax Officer and (ii) In this case what was done by the Income Tax Officer was in order to make the assessment of the assessee pursuant to the remand order, the Income Tax Officer has passed a fresh order paying an amount of Rs.57,250/- and the balance amount has been included as assessee's income and substantive assessment has already been completed. It is also contended that the finding of the Income Tax Officer in the order cannot be understood as a substantive order of assessment in the case of assessee's husband and as a matter of fact only the protective assessment made against the assessee. It implies that only after considering whether the income so added could be included in the case of the assessee's husband, a substantive assessment could be made. As such some amount

will not be included in the hands of two assessees. It is also contended that both the substantive assessment and protective assessment can simultaneously be made and placed reliance on the decision of the Apex Court in (43 ITR 387). On the other hand, the learned counsel for the assessee-respondent would contend that there cannot be an assessment of the same income in the hands of both the husband as well as the assessee and the finding of the Income Tax Officer was cristal clear that the income which was said to be added in the hands of the assessee were treated as the income of the husband and it is clearly stated that the said income will be assessed in the hands of the assessee's husband. Once such finding was made by the Income Tax Officer, thereafter the question of making any protective assessment on the assessee did not arise which has been correctly

appreciated by the Tribunal and as such no interference is called for by this Court in this appeal.

P.R.RAMAN,
Judge.

K.P.BALACHANDRAN,
Judge.

kcv.